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Supreme Court, U. S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, et al.,
Cross-Appellants,

v.

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT, et al.,
Cross-Appellees.

On Appeal From The United States District Court For The Southern District Of Texas

JURISDICTIONAL STATEMENT

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STATEMENT AS TO JURISDICTION

The cross-appellants, pursuant to United States Supreme Court Rules 12.3, or, in the alternative, 12.4, and 15, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in this case, and should exercise such jurisdiction in this case.

QUESTIONS PRESENTED

I. WHETHER THE THREE-JUDGE DISTRICT COURT ERRED IN SETTING ASIDE THE ELECTION OF THE PERMANENT BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT OR IN ENJOINING FURTHER ACTIONS TO CONDUCT AN ELECTION.

II. WHETHER THE COURT ERRED IN REFUSING TO MODIFY ITS JUDGMENT AND ORDER TO REQUIRE THE DEPARTMENT OF JUSTICE TO MEET WITH THE INTERIM BOARD OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT TO DETERMINE WHETHER ALLEGED PREVIOUS ELECTION DEFECTS COULD BE CURED.

III. WHETHER THE COURT ERRED IN ORDERING DEFENDANTS TO COLLECT AND SURRENDER TO THE CLERK ALL VOTING MATERIALS AND RECORDS OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT SINCE JANUARY 15, 1977.

PARTIES BELOW

Plaintiffs in this case were two individuals, Gurney F. Pearsall and Danny Lawson, and the Coalition to Preserve Houston and the Houston Independent School District ("the Coalition").

Defendants were the Interim Board of Trustees of the Westheimer Independent School District and the indivi-

dual board members.[1] After a board election, the complaint was amended to name the Permanent Board and its individual members.[2]

The United States of America filed a separate suit against the Westheimer Independent School District. These two Westheimer cases were consolidated, along with five others, for decision in the Northern District of Texas.

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1. The members of the Interim Board named as Defendants were: Arthur Alvarez, Joel Coolidge, Mrs. Jackie Day, William Hoffman, and Mrs. Susie Vandiver.

2. The members of the Permanent Board named as Defendants were: Joel Coolidge, Wiley B. Harle, R. M. Johnson, George J. Kostas, James R. Lederer, Don R. Mabray, and William N. Wilson.

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On Appeal From The United States District Court For The Southern District Of Texas

JURISDICTIONAL STATEMENT

OPINIONS BELOW

Seven cases were consolidated for decision in the United States District Court for the Northern District of Texas. In accordance with the Memorandum and Order of the three-judge court there in *Hereford Independent School District v. Bell,* 454 F. Supp. 143 (N.D. Tex. 1978), judgment was entered in the case now on appeal. The opinion of the three-judge court below has not been

reported. For the text of the opinion below, *see* Appendix A.

STATEMENT AS TO JURISDICTION

This action was begun in federal district court by Plaintiffs who sought declaratory and injunctive relief against the Interim Board of Trustees of the Westheimer Independent School District under the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1971 *et seq.*

A Final Judgment, accompanied by the three-judge district court's Memorandum and Order, was entered on July 1, 1980. (*see* Appendix A). Defendants' Motion for Rehearing was denied on August 27, 1980. (*see* Appendix C). Defendants filed their Notice of Appeal to this Court in the United States District Court for the Southern District of Texas on September 19, 1980. (*see* Appendix D); thus this jurisdictional statement is filed within sixty days of the filing of the Appellant's Notice of Appeal as required by Supreme Court Rules 11.3 and 12.1. The present cross-appellees have also perfected an appeal and have filed their jurisdictional statement with this Court. This jurisdictional statement is being filed within 30 days of the receipt of that statement filed by the cross-appellees; accordingly, the Cross-Appellant's appeal is perfected pursuant to Supreme Court Rule 12.4.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1253 and under 42 U.S.C. § 1973c.

STATUTORY PROVISIONS

The Voting Rights Act of 1965, as amended, 42 U.S.C. § 1971 *et seq.*, and more particularly 42 U.S.C. § 1973c, is the sole substantive statute on point. It provides in part:

§ 1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court, appeal to Supreme Court.

. . . whenever a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, on in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite,

standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

STATEMENT OF THE CASE

The instant case is one in a protracted series of actions concerning the creation and operation of the Westheimer Independent School District ("WISD"), having its genesis as far back as 1956, when a school desegregation suit was filed against the Houston Independent School District ("HISD"). An account of the history of this massive litigation is related in *Ross v. Houston Independent School District,* 559 F.2d 937 (5th Cir. 1977).

WISD was formally created on March 21, 1972, by order of the County School Trustees of Harris County. The State Commissioner of Education reversed the order. However, the State Board of Education, on October 7, 1972, reversed the Commissioner and affirmed the order of the Harris County trustees.

The formation of WISD was then challenged in the federal courts, through the addition by HISD of WISD and its Interim Board, as a third-party defendant, in the school desegregation suit. The plaintiffs there, along with HISD and the United States (as intervenor) moved to

enjoin the creation and implementation of WISD. On April 4, 1973, the United States District Court for the Southern District of Texas issued an injunction prohibiting the Interim Board from taking any steps toward creation or implementation of WISD until April 4, 1976, and for so long thereafter as the circumstances warranting the injunction remained unchanged. On April 20, 1976, WISD proponents gave notice of their intent to proceed with implementation of the district. This notice was followed by motions to enjoin any further implementation of WISD.

Following the death of Judge Connally, the case was assigned to Judge Noel, who invoked the abstention doctrine pending the outcome of proceedings in state proceedings. HISD appealed this decision to the Circuit Court of Appeals.[1]

HISD then sought reconsideration of the validity of WISD before the Texas State Commissioner of Education. On October 18, 1976, WISD petitioned to enjoin the Commissioner from reconsidering the existence of WISD.

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1. The Fifth Circuit later held that federal abstention was improper and remanded the case for consideration on the merits. *Ross v. Westheimer Independent School District,* 559 F.2d 937 (5th Cir. 1977). The Court alluded to the proceedings which are the basis of the current appeal, stating that the two election challenges under the Voting Rights Act involved issues distinct from those involved in the general desegregation suit. 559 F.2d at 945.

On remand, the district court, then under Judge Cowan, permanently enjoined the WISD proponents from taking any action to implement the district. *Ross v. Houston Independent School District,* 457 F.Supp. 18 (S.D. Tex. 1977). However, the Fifth Circuit vacated that part of the injunction which enjoined WISD's ability to maintain its corporate existence and which permanently prohibited implementation of the district, noting that future changed circumstances might permit implementation. *Ross v. Houston Independent School District,* 583 F.2d 712 (5th Cir. 1978).

The injunction was granted in the state district court in Travis County. This injunction was appealed by HISD.[2]

WISD proponents accordingly scheduled an election of a Permanent Board of Trustees for January 15, 1977. On January 14, 1977, the day before the election, the instant case was begun by the present Appellees, who sought declaratory and injunctive relief against WISD and its Interim Board, and requested that a three-judge court be convened. The requested relief was denied and the election was held.

Five days later, the United States filed a separate suit against WISD under the Voting Rights Act, 42 U.S.C. § 1973c, also seeking declaratory and injunctive relief. On July 1, 1977, the order of January 14, 1977, was vacated pursuant to a renewed request by the Coalition for the formation of a three-judge court. The two suits presently involved were consolidated, and Judge Noel requested a three-judge court. Shortly thereafter, Chief Circuit Judge Brown consolidated the two WISD cases with five others which were pending in the Northern District of Texas, all of which involved the common issue of the application of the Voting Rights Act to school districts or municipalities. The Memorandum and Order of the Northern District in *Hereford Independent School District v. Bell*, 454 F.Supp. 143 (N.D. Tex. 1978) (*see* Appendix B) directed the attorneys in the seven cases to prepare proposed judgments consistent with its opinion.

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2. The injunction was modified and affirmed by the state appellate court in *Brockette v. Westheimer Independent School District*, 546 S.W.2d 847 (Tex. Civ. App.—Austin 1977); but the Supreme Court of Texas reversed the appellate court and reinstated the order of the district court. *Westheimer Independent School District v. Brockette*, 567 S.W.2d 780 (Tex. 1978).

Ten days later, the Northern District severed the two WISD cases and remanded them to the Southern District for entry of judgment. The Coalition and the United States then moved for judgment. The three-judge court in the Southern District, from whose Final Judgment this appeal is now taken, was convened in January, 1980. Following a May 2, 1980, hearing, judgment was entered setting aside the election of 1977, dissolving the Permanent Board, and enjoining the Interim Board from conducting any elections until such time as the provisions of the Voting Rights Act are satisfied.

The district court held that school districts in the State of Texas are political subdivisions within the meaning of the Voting Rights Act of 1965, as amended, and are therefore subject to the provisions of the Act, particularly 42 U.S.C. § 1973c. It further held that the January 15, 1977, election violated the Constitution and laws of the United States, and was therefore of no legal effect. It refused, by implication, to consider any of the sixteen defenses to the two suits pleaded by the Defendants. Finally, the court dissolved the Permanent Board and permenently enjoined the Interim Board from taking any action toward the holding of an election. Defendants' Motion for Rehearing was denied August 27, 1980 (*see* Appendix C) and this appeal is now taken.

Defendants' questions on appeal were raised at various stages in the proceedings. Both questions were raised in Defendants' Answer, Defendants' Amended Answer, Defendants' Opposition to Plaintiffs' Motion for Judgment, at oral argument before the three-judge court, and in Defendants' Motion for Rehearing, but were decided adversely to Defendants/Appellants.

THE QUESTIONS ARE SUBSTANTIAL

The three-judge district court in this case has entered a judgment setting aside the election of a Permanent Board of Trustees for the Westheimer Independent School District and issuing injunctions against the Interim and Permanent Boards of WISD, all under the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1971 *et. seq.*, Section 5.

This appeal warrants plenary consideration by the United States Supreme Court for the reason that the three-judge lower court, in holding as it did, incorrectly distinguished the decision of this Court in *Allen v. Board of Elections,* 393 U.S. 544 (1969), and failed to address the applicability of *Williams v. Rhodes,* 393 U.S. 23 (1968) to the present case. Secondly, the actions of the lower court in ordering the surrender of voting materials and WISD records are in excess of the jurisdiction of that court under the Act and conflict with the mandate of the Fifth Circuit concerning the corporate existence of WISD. Finally, the complexity of this case and its importance to the voting rights of all citizens make this case prime for full consideration by this Court.

The Memorandum and Order below held that the January 15, 1977 election conducted by WISD was "in deliberate defiance of the [Voting Rights] Act." (see page A-4). This holding fails to recognize the context in which the election was held in two respects. First, it is true that federal preclearance was sought from the Attorney General. This action was taken as a precaution. However, after the preclearance was sought, the opinion was issued in *United States v. Board of Commissioners of Sheffield,* 430 F.Supp. 786 (N.D. Ala. 1976), on De-

cember 13, 1976. This case was the *only* authority concerning Section 5 coverage of entities such as WISD, and it stood for the proposition that political agencies which do not register voters, like WISD, are not political subdivisions within the meaning of the Voting Rights Act, Section 5. In the face of the *Sheffield* decision, the Attorney General's refusal to preclear the election seemed moot. Secondly, the injunctive relief sought by the Coalition was denied. In this context, it can hardly be said that WISD deliberately defied the Act, yet it was this finding which formed the basis for distinguishing *Allen, supra,* a case in which the Supreme Court declined to set aside election results.

The lower court also failed to address the applicability of *Williams, supra,* where the Supreme Court denied injunctive relief sought by the Socialist Party because they failed to promptly seek their remedy against the State of Ohio, thereby prejudicing the rights of other voters. *See* 393 U.S. at 35. Here, when the Coalition filed its suit one day before the election was to be held, absentee voting had been completed and the election machinery was in place. The United States waited until five days after the election to seek relief. Under these circumstances, the setting aside of the election unduly prejudices the rights of those voters who took part in that election, and, as in *Williams,* the relief should have been denied.

Under the rationale of the *Allen* and *Williams* cases, the district court should not have set aside the results of the election in question. At the very least, the court should have modified its Judgment so as to require the Department of Justice and the Interim Board of WISD to meet to determine whether defects in the January 15,

1977, election could be cured, and to permit the holding of future elections which comply with the Voting Rights Act.

The Court also erred in refusing to consider, to any extent, the various defenses pleaded by the WISD. Perhaps the most compelling of these was that the WISD had not enacted or sought to administer any voting qualification or prerequisite to voting or standard, practice or procedure different from that in force or in effect on November 1, 1972. If the WISD had not been enjoined in the *Delores Ross* case in 1973, this school district could have conducted its formative election in April of that year. This was *two years* prior to the time that the Voting Rights Act became applicable to Texas. Accordingly, there was no "change in voting practices or procedures" as a result of the subject election which would trigger the provisions of the Act.

Finaly, the three-judge court exceeded its jurisdiction in commanding WISD to surrender all voting materials and district records accumulated since January 15, 1977. There is simply no authority for such actions in the Voting Rights Act. Furthermore, the order compelling surrender of records conflicts with the decision in *Ross v. Houston Independent School District,* 583 F.2d 712 (5th Cir. 1978), which alowed WISD to maintain its corporate existence.

CONCLUSION

For the above reasons, either separately or in combination, this case presents questions of immediate and substantial importance, to the several states and their agencies and to each voter in the United States.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Houston Division

CIVIL ACTION No. H-77-92

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT,
Plaintiff,

v.

INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT,
Defendant,

and

CIVIL ACTION No. H-77-121

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTHEIMER INDEPENDENT SCHOOL DISTRICT,
Defendant.

MEMORANDUM AND ORDER

The Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1971 *et seq.*, ("the Act"), Section 5, prohibits a state or political subdivision from enacting or seeking to administer any voting qualification, prerequisite, standard, practice, or procedure different from that in effect on November 1, 1972 without first either instituting a declaratory judgment action in the United States District Court for the District of Columbia or obtaining approval from the Attorney General. 42 U.S.C. § 1973c. The

voting change must not have the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority. *Id.*

The Interim Board of Trustees of the Westheimer Independent School District ("WISD") requested the Attorney General to preclear a WISD special election scheduled for January 15, 1977. On January 13, 1977 the Attorney General interposed an objection under the Act to the proposed election.

The Coalition to Preserve Houston and the Houston Independent School District ("the Coalition") filed suit on January 14, 1977 seeking declaratory and injunctive relief against the Interim Board of WISD. Judge Hannay denied the Coalition's request to convene a three-judge court and refused to issue a temporary restraining order. The election was held on January 15 and the WISD Board of Trustees was elected.

The United States of America filed suit on January 20, 1977 alleging that the WISD Board violated Section 5 of the Act, 42 U.S.C. § 1973c, and seeking declaratory and injunctive relief.

The Coalition appealed from Judge Hannay's order denying it relief, then sought dismissal of the appeal in order to renew its request for a three-judge court pursuant to 28 U.S.C. § 2284(a). The Coalition also sought consolidation of its case with the government's case. The Fifth Circuit dismissed the appeal without prejudice to the Coalition's right to request from the lower court the convening of a three-judge court. On July 1, 1977 Judge Hannay's order denying a three-judge court was vacated, the cases were consolidated, and Judge Noel requested a three-judge court.

On July 29, 1977 Chief Judge Brown consolidated the Westheimer cases with a series of pending cases in the Northern District of Texas in which the common issue was whether local school districts and municipalities in Texas are political subdivisions subject to Section 5 of the Act.

The three-judge court in the Northern District of Texas ruled in accordance with the decision in a related Supreme Court case, *United States v. Sheffield Board of Commissioners,* 435 U.S. 110 (1978) and found that municipalities and school districts in Texas are "political subdivisions" as that term is defined in Section 14(c)(2) of the Act, 42 U.S.C. § 1973*l*(c)(2), and are therefore subject to the provisions of Section 5 of the Act.[1] *Hereford Inde-*

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1. The *Sheffield* Court held that § 5 of the Act applies to the City of Sheffield, concluding that § 5 of the Act "covers all political units within designated jurisdictions . . .," United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110, 135 (1978), and that Congress did not intend the substantive scope of § 5 to be limited by the definition in § 14(c)(2). *Id.* at 126. Concerning § 14(c)(2), the Court observed that the definition of "political subdivision" in that section "was intended to operate only for purposes of determining which political units in nondesignated States may be separately designated for coverage under § 4(b)." *Id.* at 129 (footnote omitted). The Court further commented that "once an area of a non-designated State has been determined to be covered, all state actors within designated political subdivisions are subject to § 4(a)." *Id.* The State of Texas has been designated as a state covered by § 4(b) of the Act. 40 Fed. Reg. 43746 (September 23, 1975); *see also* Hereford Independent School Dist. v. Bell, 454 F. Supp. 143, 144 (N.D. Tex. 1978). Thus, this Court finds unnecessary any ruling that school districts in Texas are within the definition of "political subdivision" as that term is defined in § 14(c)(2) of the Act. This Court agrees with the Northern District of Texas Court that school districts in Texas are covered by § 5 of the Act, not because school districts come within the definition of "political subdivision" found in § 14(c)(2), but for the reason that Texas school districts are political units within a designated state. *See* United States v. Sheffield Bd. of Comm'rs, *supra.*

pendent School District v. Bell, 454 F. Supp. 143, 144 (N.D. Tex. 1978). The court further held in its Memorandum and Order entered on June 2, 1978 that the school districts involved should be permanently enjoined from conducting elections under changed voting procedures until and unless these entities comply with Section 5 of the Act. *Id.* at 145.

By an order dated September 12, 1978 the three-judge court severed the Westheimer cases from those in the Northern District of Texas and remanded them to the Southern District for judgment to be entered in accordance with the decision in the consolidated case. Both of the Plaintiffs have filed Motions for Entry of Judgment and the Coalition has filed a Motion for Award of Attorneys' Fees.

The Plaintiffs point out that in the Memorandum and Order issued on June 2, 1978 the three-judge court held that school districts should be permanently enjoined from conducting elections under changed procedures until and unless Section 5 of the Act is complied with. The Plaintiffs request that the election held by WISD on January 15, 1977 be set aside and declared null and void for failure to comply with the preclearance requirements of the Act.

A request to have county elections set aside was declined by the Supreme Court of the United States in *Allen v. Board of Elections,* 393 U.S. 544, 571-72 (1969), because Section 5 coverage was then an issue of first impression, the state enactment were not so clearly subject to the Section that a failure to submit them for approval constituted deliberate defiance of the Act, and the discriminatory purpose or effect of the statutes had

not yet been determined by any court.[2] At the time of the election which is the subject of the present controversy, the Defendant apparently acknowledged the Section 5 coverage of the changed election procedures. This was evidenced by the Defendant's request to the Attorney General in a letter received on December 17, 1976, that he preclear the January 15, 1977 election (Stipulation ¶ 14). The discriminatory purpose or effect of the proposed voting changes accompanying the January 15 election was determined by the Attorney General, and he interposed an objection to the special election in a letter dated January 13, 1977 (Stipulation ¶ 15). The holding of the election by the Defendant despite the Attorney General's refusal to approve it was in deliberate defiance of the Act. Thus the instant case is readily distinguished from the circumstances of *Allen*.

The Supreme Court decided a Voting Rights Act case in 1971 in which the appellants sought to have certain elections set aside. *Perkins v. Matthews*, 400 U.S. 379

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2. One way of viewing the language in *Allen* which defined the Court's reasons for not nullifying the election is that the *Allen* Court assumed the substantive determination of discriminatory purpose or effect must be made by a court. Allen v. Board of Elections, 393 U.S. 544, 571-72 (1969). Subsequently, however, in the context of distinguishing "coverage" and "substantive" functions of the courts, the Supreme Court stated that Congress expressly had reserved consideration of the substantive determination to either the District Court for the District of Columbia or the Attorney General of the United States. *See* Perkins v. Mathews, 400 U.S. 379, 385 (1971). *But see* Matthews v. Leflore County Bd. of Election Comm'rs, 450 F. Supp. 765, 768 (N.D. Miss. 1978), wherein the Court distinguished between the statutorily defined functions of the Attorney General and the District Court for the District of Columbia: "[the Attorney General] interposed an objection [to the state statute]; and no defendant . . . has instituted an action in the . . . District Court for the District of Columbia seeking a declartory judgment that the changes . . . do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Id.* at 768.

(1971). The determination of an appropriate remedy was left for the District Court.[3] The Supreme Court, however, observed that some considerations in the determinations might include the nature of the election-procedure changes complained of and whether it was reasonably clear at the time of the election that the changes were covered by Section 5. The Court further suggested that officials should be given an opportunity to seek approval of the changes and that a new election should be required only if they refuse to do so or if approval is not forthcoming. *Id.* at 396-97.

In 1978 the Supreme Court implemented the relief suggested in *Perkins:* affording local officials the opportunity to apply for federal approval of a voting change under Section 5 instead of ordering a new election. *Berry v. Doles,* 438 U.S. 190, 193 (1978) (per curiam). Such remedy is clearly inapplicable to the present Defendant since it did attempt to have the voting change approved by the Attorney General before the election took place.

The fact that federal authorization of the election was denied rendered the holding of the election unlawful[4] and

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3. *See* Sumter County Democratic Executive Comm. v. Dearman, 514 F.2d 1168, 1170 (5th Cir. 1975) (the Fifth Circuit Court of Appeals did not void the election and followed the Supreme Court's lead in *Perkins,* leaving the question of the appropriate remedy to the three-judge court).

4 *See* Matthews v. Leflore County Bd. of Election Comm'rs, 450 F. Supp. 765, 768 (N.D. Miss. 1978), wherein a state statute which changed voting procedures was submitted to the Attorney General, an objection was interposed, and the statute was declared by the court to be without legal force or effect; United States v. County Comm'n, Hale County, Ala., 425 F. Supp. 433, 436 (S.D. Ala. 1976), *aff'd,* 430 U.S. 924 (1977), wherein the Assistant Attorney General interposed an objection to Hale County's change in the method of electing County Commissioners, the court declared certain enactments with respect thereto to be of no force or effect, and any elections conducted pursuant to the acts were found unlawful.

its legally unenforceable results shall be set aside. Pre-election relief having been sought by the Coalition and improperly refused, the election now will be set aside. *See Hamer v. Campbell,* 358 F.2d 215, 222 (5th Cir.), *cert. denied,* 385 U.S. 851 (1966).

Section 14(e) of the Act gives the court discretion to award the prevailing party, other than the United States, reasonable attorneys' fees as part of the costs. 42 U.S.C. § 1973*l*(e). The legislative history of the 1975 amendments to the Act characterizes the fee awards as essential to the full enforcement of the applicable constitutional requirements and federal statutes. S. Rep. No. 94-295, 94th Cong., 1st Sess. 41, *reprinted in* [1975] U.S. Code Cong. & Ad. News 774, 808.

The standards for awarding fees under Section 14(e) are the same as under the fee provisions of the 1964 Civil Rights Act. *Id.* at 807. A successful party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968). The Coalition obviously meets the "prevailing party" requirements for attorneys' fees purposes. It has succeeded on the significant issues in litigation,[5] *i.e.,* whether school districts in Texas are political subdivisions under the Act and are subject to the Secton 5 preclearance provisions, and has achieved the benefits sought in bringing suit.[6]

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5. Panior v. Iberville Parish School Bd., 543 F.2d 1117, 1119 (5th Cir. 1976) (quoting the legislative history of 42 U.S.C. § 19731 (e) at [1975] U.S. Code Cong. & Ad. News 774, 808); Guajardo v. Estelle, 432 F. Supp. 1373, 1387 (S.D. Tex. 1977), *aff'd in part, rev'd in part on other grounds,* 580 F.2d 748 (5th Cir. 1978).

6. The Coalition made four requests in its First Amended Complaint filed on July 13, 1977: the convening of a three-judge court, declaratory relief regarding the validity of the January 15, 1977

The fee award is not recoverable against the State of Texas or the Texas Education Agency ("TEA"), however. The Coalition contends that the State of Texas and the TEA are liable because school districts are agencies of the State and pursuant to statutorily authorized procedures, the State and the TEA became responsible for creating the WISD. By analogy to cases wherein courts have interpreted identical language in the legislative history[7] of the Civil Rights Attorney's Fees Awards Act of 1976, *amending* 42 U.S.C. § 1988, a portion of the Senate Report accompanying the 1975 amendments to Section 14(e)[8] apparently would support a finding that the State and the TEA can be held liable for attorneys' fees assessed against WISD,[9] if WISD is closely identified enough

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election, injunctive relief against any official action of the Defendant Board of Trustees, and the award of reasonable attorneys' fees and costs of suit. The decision of the three-judge court in the *Hereford* case and the present findings and Final Judgment of this Court evidence the favorable outcome of the litigation with respect to the Coalition's objectives in bringing suit.

7. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5913.

8. [D]efendants in these cases are frequently state or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either from the official directly, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).
S. Rep. No. 94-295, 94th Cong., 1st Sess. 41, *reprinted in* [1975] U.S. Code Cong. & Ad. News 774, 808.

9. In the civil rights context, the Supreme Court of the United States has held that the Eleventh Amendment does not bar an award of attorneys' fees against state officials in their official capacities. Hutto v. Finney, 437 U.S. 678, 692 (1978). In response to an objection to the district court's having directed that the fees be paid out of Department of Correction funds, the Hutto Court observed that other directives "comparable in their actual impact on the State" had been approved, and the directive was found not to be reversible error even though omission of any reference to the

with and thoroughly controlled by the State. After thorough analysis of Texas case law, the Court is not persuaded that said relationship exists between WISD and the State. *Cf. Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 280 (1977) (in determining whether Eleventh Amendment immunity extended to Board of Education, the Court found that the determination rested, in part, on the status of the entity pursuant to state law). The validity of WISD as a legal entity created pursuant to state law is not subject to challenge. *See Westheimer Independent School District v. Brockette,* 567 S.W.2d 780, 789 (Tex. 1978). The Fifth Circuit Court of Appeals acknowledged WISD's status as a validly created school district and vacated that portion of the district court's order enjoining WISD from maintaining its corporate existence. *Ross v. Houston Independent School District,* 583 F.2d 712, 716 (5th Cir. 1978). Accordingly, WISD may be viewed by this Court as being subject to the various rulings concerning independent school districts which have been rendered by Texas state and federal courts.

Texas law is clear that school districts in the State are "local public corporations of the same general character

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Department would have been better form. *Id.* at 692-93. In the *Hutto* case the defendant state prison officials were represented by the State Attorney General's office from the inception of the litigation. *Id.* at 689, 692 n.19, 693, 699, 699 n.32. The State's lawyers have not represented the instant defendant during any stage of this action.

The Fifth Circuit Court of Appeals also has held that the Eleventh Amendment is not a bar to an award of attorneys' fees against a state, *i.e.*, against state officials in their official capacities, in actions under the statutes enumerated in the Civil Rights Attorney's Fees Awards Act. *See* e.g., Rainey v. Jackson State College, 591 F.2d 1002, 1003 (5th Cir. 1979); Morrow v. Dillard, 580 F.2d 1284, 1298 (5th Cir. 1978); Rainey v. Jackson State College, 551 F.2d 672, 675 (5th Cir. 1977).

as municipal corporations." *Love v. City of Dallas*, 40 S.W.2d 20, 26 (Tex. 1931) (citation omitted); *accord*, *Lewis v. Independent School District of City of Austin*, 161 S.W.2d 450 (Tex. 1942); *Watts v. Double Oak Independent School District*, 377 S.W.2d 779 (Tex. Civ. App.—Ft. Worth 1964, no writ). By virtue of that status, for example, school districts and their trustees have been cloaked with immunity from negligence in tort actions while they are exercising governmental functions. *See, e.g., Campbell v. Jones*, 264 S.W.2d 425 (Tex. 1954); *Russell v. Edgewood Independent School District*, 406 S.W.2d 249 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.); *Treadway v. Whitney Independent School District*, 205 S.W.2d 97 (Tex. Civ. App.—Waco 1947, no writ). Further, as political subdivisions of the State, school districts are exempt from execution or garnishment proceedings. *See National Surety Corporation v. Friendswood Independent School District*, 433 S.W.2d 690, 694 (Tex. 1968).

Although school districts in Texas are subject to direct statutory control by the State Legislature, the legislature may delegate and has delegated much of the control of the districts to the local trustees. *See, e.g., University Interscholastic League v. Midwestern University*, 255 S.W.2d 177 (Tex. 1953); *Alanreed Independent School District v. McLean Independent School District*, 354 S.W.2d 232 (Tex. Civ. App.—Amarillo 1962, writ ref'd n.r.e.); *Independent School District v. Central Education Agency*, 247 S.W.2d 597 (Tex. Civ. App.—Austin 1952), *aff'd*, 254 S.W.2d 357 (Tex. 1953). Moreover, "the tradition of local autonomy in education seems long and powerful in Texas," *Rogers v. Brockette*, 588 F.2d 1057, 1064 (5th Cir.), *cert denied*, 100 S.Ct. 52 (1979), and be-

cause the State provides for such extensive local control, *see Port Arthur Independent School District v. City of Groves,* 376 S.W.2d 330, 333 (Tex. 1964), express limitations exist on the legislature's power to statutorily control school districts. *See, e.g., Port Arthur Independent School District v. City of Groves, supra; Love v. City of Dallas, supra.* The Texas Supreme Court specifically has declined to equate the identities of school districts and the State insofar as property is concerned: "Although our independent school districts are creatures of the state and receive substantial funds for their operation from the state, they are independent political entities and we will not classify their property as state property." *Port Arthur Independent School District v. City of Groves, supra,* at 333. Throughout the case law concerning the status of school districts in Texas, a marked pattern emerges: the same courts that characterizes school districts as agencies of the State also decline to establish the close identity between district and State or the thorough control by State over district that would justify holding the State or its agent, the TEA, liable for attorneys' fees awarded against WISD.[10] In the Westheimer cases the local entity

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10. A discerning analysis of the separate identities of the State of Texas and its school districts can be found in Rogers v. Brockette, 588 F.2d 1057 (5th Cir.), *cert. denied,* 100 S.Ct. 52 (1979). The Court notes that said analysis was in the context of the Fifth Circuit's ascertaining an independent school district's standing to sue the State of Texas; nevertheless, the Court finds the reasoning of the Fifth Circuit extremely helpful in the context of the instant decision. The Fifth Circuit observed that school districts and the State may represent different constituencies: "The school board and the state represent different political interests with different degrees of influence; a group can be a statewide minority, for example, but a majority in certain localities." *Id.* at 1062. In determining that the Garland Independent School District was sufficiently independent of the State to ensure the adversariness required by Article III of the Constitution, the *Rogers* court outlined in some detail the relationship between school districts and the State:

subject to the Section 5 preclearance provisions is the party sued and the Coalition's award is collectible against the Defendant school district itself.

The Court of Appeals for the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) set down twelve guidelines to be followed

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> Legally, independent school districts in Texas have a variety of powers. They perform "all educational functions not specifically delegated" to the state education agencies. Tex. Educ. Code Ann., tit. 2, § 11.01. They are specifically empowered to make contracts, *id.*, §§ 23.26, 23.28, to levy and collect taxes, *id.* § 23.27, to obtain property by eminent domain, *id.* § 23.31, and generally "to manage and govern the public free schools of the district," *id.* § 23.26(b). They can sue and be sued. *Id.*, § 23.26(a).
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> The state can, to be sure, supervise the local boards to some degree. The state education authorities may review local school board's decisions, Tex. Educ. Code Ann., tit. 2, § 11.13, and the local boards are bound by regulations issued by the state agency, *Bear v. Donna Ind. School Dist.*, 85 S.W.2d 797, 798 (Tex. Civ. App. 1935). But local boards are then free to attack the state agency's decisions in court. *See e.g., Board of Trustees v. Briggs*, 486 S.W.2d 829 (Tex. Civ. App. 1972). Thus it seems clear that local boards have some significant legal rights that the state agency cannot take away.
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> As a practical matter, too, local school boards seem likely to enjoy a good deal of freedom from state authorities. The members of the local boards are elected by the people of the district, not appointed from above. Tex. Educ. Code Ann., tit. 2, § 23.10 (b). Moreover, the local boards have their own funds. They can levy and collect taxes, *id.* § 23.27, and funds disbursed by the state to the districts become the property of the local board of trustees, which holds them in trust for the district; they cannot be taken away by the state. *Wright v. Houston Ind. School Dist.*, 393 F. Supp. 1149, 1155 (S.D. Tex. 1975), *vacated and remanded on other grounds*, 569 F.2d 1383 (5th Cir. 1978); *Love v. City of Dallas*, 120 Tex. 351, 40 S.W.2d 20, 26 (1931).

Id. at 1065-66 (emphasis in original). Further, the court interpreted two Supreme Court decisions as suggesting that actions of school districts are not to be treated as direct acts of the state itself. *Id.* at 1066, citing San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Milliken v. Bradley, 418 U.S. 717 (1974).

by district courts in awarding attorneys' fees. These standards apply in a Voting Rights Act case. *Fain v. Caddo Parish Police Jury,* 564 F.2d 707, 710 (5th Cir. 1977). The *Johnson* court further specified that any agreement which has been made as to fees is not controlling; the court assessing fees must determine what is reasonable, but in no event may the award be greater than what the litigant was contractually bound to pay. *Johnson v. Georgia Highway Express, Inc., supra,* at 718. The court must determine the reasonableness of the fee pursuant to the following factors:

1. *The time and labor required.* The Plaintiff Coalition's attorneys have submitted a detailed record of the time spent on the case including the dates and nature of the work performed during the time in question. (Motion for Award of Attorneys' Fees, Exhibit B). A total of 632.5 hours was spent by attorneys for the Coalition and their paralegal assistants over a period of approximately three years. (Motion for Award of Attorneys' Fees, Exhibit A). The Plaintiff's attorney has indicated that 105.25 of the total hours were spent by paralegals. The time spent by paralegals, computed at appropriate paralegal rates, reasonably can constitute part of the time considered in awarding attorneys' fees. *See, e.g., Dietrich Corp. v. King Resources Co.,* 596 F.2d 422 (10th Cir. 1979); *Todd Shipyards v. Director, Office of Workers' Compensation,* 545 F.2d 1176 (9th Cir. 1976); *cf. Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624, 637 (6th Cir. 1979) ("necessary services performed by attorneys which could reasonably have been performed by less expensive personnel may be compensated at a lower rate, . . . [but] they should not be excluded altogether"); *Johnson v. Georgia Highway*

Express, Inc., supra, at 717 (non-legal work may be compensated at a rate lower than legal work regardless of whether the non-legal work is performed by an attorney or by paralegal personnel). Although an attorney's record of time is not a talisman, the *Johnson* case mandates that the hours claimed be given real consideration. *Rainey v. Jackson State College,* 551 F.2d 672, 677 (5th Cir. 1977). Considering the nature of the litigation, the expenditure of time and labor does not appear excessive; in any event the accuracy and adequacy of the affidavits are uncontroverted.

Where more than one attorney is involved in a case, the possibility of duplication of effort must be scrutinized. The record reflects some duplication of Miss Perkins' efforts by Mr. Catron, particularly with regard to his establishing familiarity with the case file and researching the attorneys' fees issue. A ten per cent (10%) downward adjustment in the fees of these attorneys takes these factors into account.

A differentiation of rates based upon the type of labor performed is also in order. *See Johnson v. Georgia Highway Express, Inc., supra,* at 717. The Court distinguishes three categories of the type of work performed: (1) strictly legal activities, which include legal research, writing, and court appearances; (2) legally related activities, which include conferences, telephone calls, and other correspondence; and (3) routine administrative activities, which include travel time, clerical work, and compiliation of facts and statistics. For purposes of the application of different rates to different types of work, the first category will be referred to as work on the merits of the case; the second category will be called informal communications;

and the third category will be referred to as non-legal work.

2. *The novelty and difficulty of the questions.* This was a case of first impression which involved many difficult questions of law arising under 42 U.S.C. §§ 1971 *et seq.* In addition to the complicated substantive questions, many complex procedural issues had to be dealt with in the litigation.

3. *The skill requisite to perform the legal service properly.* The performance of the Plaintiff's attorneys can be evaluated primarily through the documents on file in the record of the case since relatively few court appearances were made during the protracted course of this litigation. A high degree of legal skill was required to deal with the complex issues in the case and the Coalition's attorneys have demonstrated commendable expertise through the extensive briefs and other work product before the Court.

4. *The preclusion of other employment by the attorney due to acceptance of the case; time limitations imposed by the client or the circumstances.* Although this case did not foreclose any other business for counsel due to conflicts of interest, the time spent on the case over the months appeared to preclude Mr. Pannill and Mrs. McCreary from engaging in other work. Counsel undoubtedly gave this matter high priority, and due to the emergency basis on which some portions of the suit had to be conducted, working on the case required counsel to expedite or delay other work.

5. *The amount involved and the results obtained.* Although no damages were requested or are to be awarded in this case, the Plaintiffs did succeed in enjoining the

operation of the WISD Board of Trustees which was elected by unlawful means. This success on the merits preserves important constitutional rights embodied in the Fifteenth Amendment and the Voting Rights Act of 1965, as amended.

6. *The "undesirability" of the case.* Counsel's representation of the Coalition occasionally was received unpleasantly by the community and by clients of the firm. Representation of the Coalition had an adverse economic impact on the firm's practice on at least one occasion, when a client ceased to use the firm after learning of its representation of the Coalition.

7. *The nature and length of the professional relationship with the client.* This standard is not a relevant factor in the determination of fees in this case. The Coalition was formed to oppose the Westheimer elections and its existence will no doubt cease when the litigation has ended.

8. *The customary fee; the experience, reputation, and ability of the attorneys; whether the fee is fixed or contingent; awards in similar cases.* The Plaintiff has been ably served by its attorneys who skillfully met the substantive and procedural challenges presented in this case. Regarding the customary fee for similar work in the community, the Court finds that $100 an hour for work on the merits is a reasonable rate for Mr. Pannill's time. This rate of course will be adjusted downward for informal communications and non-legal work. Mr. Pannill's qualifications, along with those of the other attorneys involved, appear in Exhibit C to the Plaintiff's Motion for Award of Attorneys' Fees. William Pannill, lead attorney for the Coalition, is a 1970 graduate of the University of Texas

School of Law. He maintains an active federal practice and is admitted to practice before the United States Supreme Court, in addition to other federal courts.

Jacqueline McCreary is a 1971 graduate of the University of Texas School of Law. The Court finds that $75 an hour is a reasonable and customary fee for her work related to the merits. Miss Perkins is a 1975 graduate of the University of Houston's Bates College of Law. Mr. Catron was graduated from the University of Texas School of Law in 1976. Fees of $50 per hour for these attorneys are reasonable for cases of this nature litigated in this District.

In determining whether the fee was fixed or contingent, the Court is mindful of the directive of the *Johnson* court concerning fee contracts, *Johnson v. Georgia Highway Express, Inc., supra,* at 718, and points out that in the Motion for Award of Attorneys' Fees, a fee of $50 per hour once was characterized as an "amount agreed on." The Court, however, has considered the total discussion pertaining to a fee agreement that is included in the Motion. Accordingly, the Court agrees with the Coalitions's attorney that $50 per hour was not an agreed fee, but merely reflected the limitations of the Coalition's financial capability. The Court, therefore, concludes that Mr. Pannill was not working for the Coalition pursuant to any contractual agreement constituting a fixed maximum fee. The special circumstances of this case render the hourly rates explained above reasonable. Such an award serves the congressional purpose of granting fees commensurate with those in other types of equally complex federal litigation. [1971] U.S. Code Cong. & Ad. News at 808. The fee is not to be reduced because the

rights involved are nonpecuniary in nature. *Id.* As examples of fee awards in similar cases, the Plaintiff's attorneys cite *Guajardo v. Estelle,* 432 F. Supp. 1373 (S.D. Tex. 1977), *modified on other grounds,* 580 F.2d 748 (5th Cir. 1978), the Memorandum Concerning Motions for Costs and Attorneys' Fees, *Ross v. Houston Independent School District* (C.A. No. 10,444, February 1, 1979), and the June 4, 1979 Order Concerning Assessment of Attorneys' Fees in *Ross* v. *Houston Independent School District, supra.*

Having considered the above factors, and based both on this Court's experience and familiarity with the fees charged in this legal community, and on the standard provided in *Cruz v. Beto,* 453 F. Supp. 905, 910-11 (S.D. Tex. 1977), *aff'd,* 603 F.2d 1178, 1186 (5th Cir. 1979), the Court has arrived at the following hourly rates. Mr. Pannill's time should be valued at $100 per hour for work related to the merits, $85 per hour for informal communications, and $20 per hour for non-legal work. *See Johnson v. Georgia Highway Express, Inc., supra,* at 717: "[The] dollar value [of non-legal work] is not enhanced just because a lawyer does it." *Id.* at 717. Mrs. McCreary should receive an hourly rate of $75 for work related to the merits, $60 for informal communications, and $20 for non-legal work. Miss Perkins' and Mr. Catron's time should be valued at $50 an hour for work on the merits and at $30 an hour for informal communications. Paralegals should be compensated at $20 per hour. The total amount due for the claimed hours computes as follows:

	Work on merits	Informal Comm.	Non-Legal Work	Less Discount	Total Comp.
William Pannill	151.50 x $100	145.75 x $85	11.5 x $20	0	$27,768.75
Jacqueline McCreary ..	100 x $ 75	20.5 x $60	6.75 x $20	0	$ 8,865.00
Susan Perkins	24 x $ 50	.5 x $30	—	10%	$ 1,093.50
Gary Catron	64 x $ 50	2.75 x $30	—	10%	$ 2,954.25
Paralegals			105.25 x $20		$ 2,105.00
Expenses					$ 1,697.71
GRAND TOTAL ..					$44,484.21

Therefore, it is ORDERED, ADJUDGED and DECREED that the Plaintiff Coalition's Motion for Judgment is hereby GRANTED, that the Plaintiff United States' Motion for Entry of Judgment is hereby GRANTED,[11] and that the Plaintiff Coalition's Motion for Award

11. In the Defendant's Opposition to Plaintiff's Motion for Judgment the Defendant asserts that there are still sixteen defenses to be ruled upon by a proper court. Two of the defenses advanced are that all of the material fact issues in this case have been decided adversely to the United States' position in *Ross v. Houston Independent School Dist.*, 583 F.2d 712 (5th Cir. 1978), and in the Coalition's case against WISD, C.A. No. H-77-92, and that relitigation of these issues is barred because of the doctrines of collateral estoppel and *res judicata*. These doctrines do not bar the present litigation. The court in *Ross* made the determination that a permanent injunction against WISD's status as a validly created school district under state law is excessive and must be vacated. 583 F.2d at 716. The question of the application of the Voting Rights Act to the district and its January 15, 1977 election was not addressed. *See Ross v. Houston Independent School Dist.*, 559 F.2d 937, 945 (5th Cir. 1977). The issues in C.A. No. H-77-92 were not decided adversely to the Plaintiff's position and no final judgment was entered in that action. The appeal of Judge Hannay's order denying a temporary restraining order and the convening of a three-judge court was dismissed without prejudice to the Coalition's right to renew

of Attorneys' Fees is hereby GRANTED to the extent herein expressed.

Signed this 1st day of July, 1980.

JOHN R. BROWN
United States Circuit Judge

CARL O. BUE
United States District Judge

ROBERT O'CONOR, JR.
United States District Judge

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its request for a three-judge court at the district court level. Judge Hannay's order was vacated and Chief Judge Brown responded to Judge Noel's request for a three-judge court by consolidating the combined Westheimer cases (C.A. No. H-77-92 and C.A. No. H-77-121) with the *Hereford* cases in the Northern District of Texas. The Westheimer cases are now ripe for the entry of Final Judgment. The proper court to rule upon any other issues presented by the Defendant's enumerated defenses, which have not already been resolved by the Supreme Court in *Sheffield*, by the three-judge court in *Hereford*, or by this Court, is a three-judge District Court for the District of Columbia, 42 U.S.C. § 1973c; H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 2437, 2458.

APPENDIX B

In The
UNITED STATES DISTRICT COURT
For The Northern District of Texas

CIVIL ACTION NO. CA-2-77-14
ALL CASES

HEREFORD INDEPENDENT SCHOOL DISTRICT et al.,
Plaintiffs,

v.

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, et al.,
Defendants

MEMORANDUM AND ORDER

The decision and opinion of The United States Supreme Court in *United States of America v. Commissioners of Sheffield, Alabama, et al.,* (No. 76-1662, March 6, 1978), disposes of the threshold question in these consolidated cases. This court therefore holds that municipalities and school districts in the State of Texas are "political subdivisions" as that term is defined in Section 14(c)(2) of the Voting Rights Act of 1965, as amended. As such these entities are subject to the provisions of Section 5 of the Act when said entities enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure, with respect to voting different from that in force or effect on November 1, 1972.

Further this court is of the opinion that the application of Section 5 of the Act, as amended, to the municipality and school districts involved in the case *sub judice* is not retroactive in effect, and thus not violative of the ex post facto provision of Article I, § 9 of the United States Constitution or the due process clauses of the Fifth and Fourteenth Amendments. It is contended that the changes in the respective election procedures were enacted subsequent to November 1, 1972 but prior to August 6, 1975 (the date the Act became applicable to the State of Texas), and therefore these particular changes could be implemented without compliance with Section 5 of the Act. The theory is that Section 5 of the Act did not become applicable to these entities until after their election procedures were changed, therefore any enforcement of that section as to them is necessarily retroactive. This court cannot agree.

Section 5, by its terms, prohibits a political subdivision from enacting or *seeking to administer* any voting change different from that in effect on November 1, 1972 without first obtaining "preclearance" from the Attorney General or a declaratory judgment from the District Court of the District of Columbia declaring that such a change does not have the purpose or effect, *inter alia,* of denying or abridging the right to vote on account of race or color. Prohibiting political subdivisions from administering a voting change, that is, conducting an election pursuant to election changes enacted after November 1, 1972 but before the date of the applicability of the Act to such political subdivisions, does not have the effect of applying Section 5 retroactively, but rather such prohibition is prospective for the reason that such political subdivisions are prohibited only from conducting elections pursuant

to such enactments in the future, and no past actions are proscribed.

Therefore the court finds that the municipality and school districts herein should be permanently enjoined from conducting elections under the changed procedures until and unless, with respect to the election procedures enacted after November 1, 1972, these entities comply with Section 5 of the Voting Rights Act of 1965, as amended.

Nothing herein shall be construed as invalidating any actions, which were otherwise lawful, taken or performed prior to this date by any officials heretofore elected to office in elections conducted pursuant to election procedures enacted by these entities after November 1, 1972.

The attorneys in each of the cases which have been consolidated under the above number will confer with opposing counsel and counsel for the United States will prepare and submit proposed judgments in each case not inconsistent with this opinion and which judgments shall provide, where applicable, the following:

1. A declaration that the Voting Rights Act of 1965 applies to school districts and municipalities in the State of Texas.

2. That the Voting Rights Act of 1965 is applicable even though the change in election procedures was enacted by the governing board before the date that the Act became effective to Texas and subsequent to November 1, 1972.

3. The injunctions in the *Gomez v. Galloway* and *Hawkins Independent School District* cases will be made permanent.

4. The court refuses to certify any class action in *Gomez v. Galloway*, No. 76-C-146, and finds that a reasonable attorney's fee that defendants are required to pay to the attorneys for plaintiffs in this case is the sum of $7,500.00 which is here ordered to be paid by defendants to said attorneys in this case.

5. In the *Midland* and *Hereford* cases a permanent injunction will be entered prohibiting these entities from seeking to administer or holding any further election under the changed voting procedures enacted by these entities subsequent to November 1, 1972 until and unless all of the provisions of the Voting Rights Act of 1965 are complied with.

6. Any other relief requested and prayed for is denied except that as specifically set forth above.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 2nd day of June A.D., 1978.

IRVING L. GOLDBERG
Circuit Judge

HALBERT O. WOODWARD
District Judge

PATRICK E. HIGGINBOTHAM
District Judge

In The
UNITED STATES DISTRICT COURT
For The Northern District of Texas
Dallas Division

CIVIL ACTION NO. H-77-92

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT,
Plaintiff,

v.

INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT,
Defendant,

and

CIVIL ACTION NO. H-77-121

CONSOLDATED NO. CA-2-77-14

In the United States District Court for The
Northern District of Texas,
Dallas Division

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTHEIMER INDEPENDENT SCHOOL DISTRICT,
Defendant.

ORDER

The above cases were consolidated for trial before a three-judge court in the Northern District of Texas and

the common questions of law that were present in all of the cases have been presented to said three-judge court and a memorandum opinion was entered by the court, which is attached hereto and referred to for all purposes.

It appears that this memorandum and ruling of the three-judge court is decisive of all issues to be determined by this three-judge court in the cases from the Houston Division of the Southern District of Texas. It is further known that there are other cases involving the Houston and Westheimer Independent School Districts on the docket of the Houston Division of the Southern District of Texas, and not before this court, but this court is of the opinion that final judgment should be entered in the above cases by the Southern District of Texas rather than this three-judge court as it may have some bearing on these related cases.

Therefore, each of the above cases is remanded to the Southern District of Texas for judgment to be entered by the Southern District of Texas in accordance with the attached decision and opinion in the consolidated cases.

The Clerk will furnish a copy hereof to all attorneys and will remand each of the cases together with a copy of this order to the Southern District of Texas.

ENTERED this 12th day of September A.D. 1978.

HALBERT O. WOODWARD
Chief Judge,
Northern District of Texas

APPENDIX C

In The
UNITED STATES DISTRICT COURT
Southern District of Texas
Houston Division

CIVIL ACTION No. H-77-92

COALITION TO PRESERVE HOUSTON AND
THE HOUSTON INDEPENDENT
SCHOOL DISTRICT,
Plaintiff,

v.

INTERIM BOARD OF TRUSTEES OF THE
WESTHEIMER INDEPENDENT
SCHOOL DISTRICT,
Defendant,

and

CIVIL ACTION No. H-77-121

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTHEIMER INDEPENDENT
SCHOOL DISTRICT,
Defendant,

FINAL JUDGMENT

This action having come on for hearing before the three-judge District Court for the Northern District of Texas and a Memorandum and Order having been entered by that Court on June 2, 1978, and in accordance with this Court's Memorandum and Order of even date herewith, entered after this Court's hearing of the matter on May 2, 1980.

It is ORDERED, ADJUDGED and DECREED that

1. The Voting Rights Act of 1965, as amended, applies to school districts in the State of Texas.

2. The Voting Rights Act of 1965, as amended, applies to changes in election procedures enacted or administered subsequent to November 1, 1972 and before the date that the Act became applicable to Texas, as well as to voting changes occurring after that date.

3. The official body of the State of Texas known as the Interim Board of Trustees of the Westheimer Independent School District and each of its members, Joel B. Coolidge, Jackie Day, Arthur Alvarez, William Hoffman, and their agents and successors in office, are hereby permanently restrained and enjoined from taking any action to conduct any election for or on behalf of the Westheimer Independent School District under changed voting procedures enacted subsequent to November 1, 1972 unless and until all of the provisions of the Voting Rights Act of 1965, as amended, are complied with.

4. The election conducted by the Interim Board of the Westheimer Independent School District on January 15, 1977, pursuant to its election orders of October 14, 1976, November 11, 1976, and December 9, 1976 violated the Constitution and laws of the United States. The election results are hereby set aside and the election declared null and void and of no legal force or effect.

5. The corporate body formed pursuant to the unlawful election held on January 15, 1977 known as the Permanent Board of Trustees of the Westheimer Independent School District hereby is ordered dissolved and all acts of the said body are set aside and each of the members of the Permanent Board, Joel B. Coolidge, George J. Kostas, R. M. Johnson, Wiley B. Harle, Jim Lederer, William N. Wilson, and Don R. Mabry are hereby restrained and

enjoined from acting in concert as a body corporate and politic of the State of Texas styling itself the Board of Trustees of the Westheimer Independent School District or as members or officers of such a body.

6. The Westheimer Independent School District and the members of its Board of Trustees, interim or permanent, and their successors in office, are hereby ordered to collect and surrender to the Clerk all ballots, canvass sheets, and other voting material used or connected with the unlawful election of January 15, 1977.

7. The Permanent Board of Trustees of the Westheimer Independent School District and each of its members are hereby ordered to collect and surrender to the Clerk the records, cancelled checks, contracts, correspondence, minutes, and other documents of any kind pertaining to the Westheimer Independent School District since the January 15, 1977 election.

8. The Plaintiff Coalition to Preserve Houston and the Houston Independent School District is hereby awarded a reasonable attorneys' fee of $44,484.21 together with all costs of court, such attorneys' fees and costs to be satisfied out of funds of the Westheimer Independent School District and its Interim Board of Trustees, and their successors in office in their official capacities.

Signed this 1st day of July, 1980.

JOHN R. BROWN
United States Circuit Judge

CARL O. BUE
United States District Judge

ROBERT O'CONOR, JR.
United States District Judge

C-4

In The
UNITED STATES DISTRICT COURT
Southern District of Texas
Houston Division

CIVIL ACTION No. H-77-92

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT,
Plaintiff,

v.

INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT,
Defendant,

and

CIVIL ACTION No. H-77-121

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTHEIMER INDEPENDENT SCHOOL DISTRICT,
Defendant.

ORDER

Defendant's Motion for Rehearing is hereby DENIED.

Signed this 27th day of August, 1980.

ROBERT O'CONOR, JR.
United States District Judge

APPENDIX D

In The
UNITED STATES DISTRICT COURT
For The Southern District of Texas
Houston Division

C. A. NO. H-77-92

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT, DR. GURNEY F. PEARSALL, and DANNY LAWSON,
Plaintiffs

v.

INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT ET AL.,
Defendants

AND

C. A. NO. H-77-121

CONSOLDATED NO. CA-2-77-14

In the United States District Court for the
Northern District of Texas,
Dallas Division

UNITED STATES OF AMERICA,
Plaintiff

v.

WESTHEIMER INDEPENDENT SCHOOL DISTRICT,
Defendant

D-2

CONDITIONAL NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed August 28, 1980)

THE INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, et al, and THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, et al, hereby give their Conditional Notice of Appeal to the Supreme Court of the United States from the Judgment entered against them in the consolidated action on July 1, 1980. This notice is conditional upon this court's ruling relating to the Westheimer Independent School District's Motion for Rehearing. With respect to that Motion, the Coalition to Preserve Houston and the Houston Independent School District has filed a false allegation that it was not properly served with the Appellant's Motion for Rehearing, even though such motion was mailed to the Coalition's counsel in a timely fashion pursuant to the Federal Rules of Civil Procedure. It is presumed that under those rules an argument could be made that if the Coalition's false allegation is believed, the Westheimer Independent School District's Motion for Rehearing does not extend the time for filing its Notice of Appeal to the Supreme Court of the United States.

Accordingly, this Conditional Notice of Appeal is submitted pursuant to 28 U.S.C. §§ 1253 and 2101 in the event there be any final judgment in this matter from which an appeal can be taken. If the Notice of Appeal to the Supreme Court of the United States filed by the Coalition in this case is not premature, then this Notice of Appeal may also be considered a Notice of Cross-Appeal to the Supreme Court of the United States from

the Final Judgment entered against these Appellants on July 1, 1980.

Respectfully submitted,

ROSS, GRIGGS & HARRISON

By /s/ CHARLES W. KELLY
Charles W. Kelly
2600 Two Allen Center
Houston, Texas 77002
713/651-0600

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Conditional Notice of Appeal To The Supreme Court Of The United States has been served upon the following parties, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; William Pannill, Pannill and Hooper, 1100 Milam Building, Suite 580, Houston, Texas 77002; Ann Kraatz, Assistant Attorney General, Supreme Court Building, Room 417, Austin, Texas 78701; Elton O. Bowen, Commissioner of Education, Texas Education Agency, 201 East 11th Street, Austin, Texas 78701; and Edgar Reeves, Chairman, Harris County Board of Education, 6515 Irvington, Houston, Texas 77002, by mailing same to them on this 26th day of August, 1980.

/s/ CHARLES W. KELLY
Charles W. Kelly

D-4

In The
UNITED STATES DISTRICT COURT
For The Southern District of Texas
Houston Division

C. A. NO. H-77-92

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT, DR. GURNEY F. PEARSALL, and DANNY LAWSON,
Plaintiffs

v.

INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT ET AL.,
Defendants

AND

C. A. NO. H-77-121

CONSOLDATED NO. CA-2-77-14

In the United States District Court for the
Northern District of Texas,
Dallas Division

UNITED STATES OF AMERICA,
Plaintiff

v.

WESTHEIMER INDEPENDENT SCHOOL DISTRICT,
Defendant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed September 19, 1980)

THE INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, et al, and THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, et al, Defendants, hereby give their Notice of Appeal to the Supreme Court of the United States from the Judgment entered against them in the consolidated action on July 1, 1980, and from this Court's Order of August 27, 1980, denying these Defendants' Motion for Rehearing.

Respectfully submitted,

ROSS, GRIGGS & HARRISON

By /s/ CHARLES W. KELLY
Charles W. Kelly
2600 Two Allen Center
Houston, Texas 77002
713/651-0600

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Notice of Appeal To The Supreme Court Of The United States has been served upon the following parties, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; William Pannill, Pannill and Hooper, 1100 Milam Building, Suite 580, Houston, Texas 77002; Ann Kraatz, Assistant Attorney General, Supreme Court Building, Room 417, Austin, Texas 78701; Elton O. Bowen, Commissioner of Education, Texas Education Agency, 201 East 11th Street, Austin, Texas 78701; and Edgar Reeves, Chairman, Harris County Board of Education, 6515 Irvington, Houston, Texas 77002, by mailing same to them on this 19th day of September, 1980.

/s/ CHARLES W. KELLY
Charles W. Kelly

No. 80-805

JAN 12 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, ET AL., APPELLANTS

v.

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

WADE H. MCCREE, JR.
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
DENNIS J. DIMSEY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-805

INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, ET AL., APPELLANTS

v.

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in setting aside the January 15, 1977, special election of the Permanent Board of Trustees of the Westheimer Independent School District after concluding that the election violated Section 5 of the Voting Rights Act of 1965.

2. Whether the district court abused its discretion in requiring the School District to surrender to the clerk all materials concerning the invalidated election and all records pertaining to the District's post-election operations.

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Statute and rule:

Voting Rights Act of 1965, Section 5, 42 U.S.C. 1973c 1, 2, 3, 4, 5, 6, 7, 8, 9

Sup. Ct. Rule 16(1)(c) 9

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Pursuant to Rule 16 of the Rules of this Court, the United States moves for affirmance of the judgment of the district court insofar as it invalidates the January 15, 1977, election conducted by the Interim Board of Trustees of the Westheimer Independent School District and requires surrender to the court of materials and records relating to that election.[1]

OPINION BELOW

The opinion of the district court (J.S. App. A-1 to A-20) is reported at 494 F. Supp. 738.

JURISDICTION

The judgment of the district court (J.S. App. C-1 to C-3) was entered on July 1, 1980. Cross-appellants' motion for rehearing was denied on August 27, 1980 (J.S. App. C-4). A notice of appeal was filed on September 19, 1980 (J.S. App. D-4 to D-5), and the jurisdictional statement was filed on November 17, 1980. The jurisdiction of this Court is invoked under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

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[1]The judgment also awards the Coalition to Preserve Houston and the Houston Independent School District attorneys' fees and costs, to be paid by the Westheimer Independent School District and its Interim Board of Trustees (J.S. App. C-3). The Coalition has sought review of this award in this Court (No. 80-697, filed October 27, 1980), contending that the award is too low and that the court should have made the state government and the county board of education, as well as the Westheimer Board, liable for the fee awarded. The United States took no position in the district court concerning the appropriateness of the fee award and we express no view on that question here.

STATUTE INVOLVED

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides in pertinent part:

> [W]henever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such * * * standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, * * * and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such * * * standard, practice, or procedure: *Provided,* That such * * * standard, practice, or procedure may be enforced without such proceeding if * * * [it] has been submitted by the chief legal officer * * * of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission * * *.

STATEMENT

1. This cross-appeal arises from the January 15, 1977, election of the Permanent Board of Trustees of the Westheimer Independent School District (WISD).[2] On December 17, 1976, the Attorney General received a letter from the Interim Board of Trustees of WISD requesting preclearance of the January 15 election pursuant to Section 5 of the Voting Rights Act (J.S. App. A-2, A-5). The Attorney General was unable to determine that the proposed election would not have the purpose or effect of discriminating on the basis of race, and, accordingly, on January 13, 1977, interposed an objection under the Act to the proposed election (*ibid.*).

The following day the Coalition to Preserve Houston and the Houston Independent School District ("the Coalition") filed suit under Section 5 seeking to enjoin the election. United States District Judge Hannay, without opinion, denied the Coalition's request to convene a three-judge court and refused to issue a temporary restraining order. The election was held on January 15 and the Permanent Board of Trustees of WISD was elected (J.S. App. A-2).

On January 20, 1977, the United States filed suit for declaratory and injunctive relief, alleging that the election violated Section 5 (*ibid.*).

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[2]WISD was created in 1972 by order of the County School Trustees of Harris County, Texas (J.S. 4). The formation of the school district was challenged on the ground that it would impede desegregation of the Houston Independent School District (HISD). After extensive litigation, the United States Court of Appeals for the Fifth Circuit held that WISD could maintain the corporate status it had perfected under Texas law and could "pursue those of its organizational rights under state law that do not involve the independent operation of a portion of HISD as WISD." *Ross* v. *Houston Independent School District*, 583 F. 2d 712, 716 (1978).

The Coalition appealed Judge Hannay's order denying relief but later sought dismissal of the appeal in order to renew its request for a three-judge court. The Coalition also sought consolidation of its case with the government's. The court of appeals for the Fifth Circuit dismissed the appeal without prejudice to the Coalition's right to request the convening of a three-judge court J.S. App. A-2

On July 1, 1977, United States District Judge Noel vacated Judge Hannay's January 14, 1977, order, consolidated the two cases, and requested the convening of a three-judge court (*ibid.*). Shortly thereafter, Chief Circuit Judge Brown joined the WISD cases with a series of cases pending before a three-judge court in the Northern District of Texas, all of which presented the question whether Texas school districts and municipalities which do not register voters are subject to the preclearance requirements of Section 5 (*id.* at A-3).

The three-judge court in the Northern District of Texas, on the basis of this Court's decision in *United States* v. *Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110 (1978), held that school districts and municipalities in Texas are subject to the requirements of Section 5 of the Act (J.S. App. A-3, B-1). The court enjoined the defendants in these cases from conducting elections under voting procedures different from those in effect on November 1, 1972, unless the requirements of Section 5 are satisfied (J.S. App. A-4, B-1). On September 12, 1978, the court severed the WISD cases from those in the Northern District of Texas and remanded them to the Southern District for entry of judgment. The United States and the Coalition then moved for judgment, and the Coalition moved also for an award of attorneys' fees (J.S. App. A-4). A three-judge court was convened in January 1980 and a hearing was held on May 2, 1980 (J.S. B-7). The court issued its opinion and final judgment on July 1, 1980 (J.S. App. A-1 to A-20).

2. The district court held that Texas school districts are subject to Section 5 of the Voting Rights Act (J.S. App. A-2, note 1; C-2). The court ruled that the January 15, 1977, election violated Section 5 and was therefore without legal effect (J.S. App. C-2). The court enjoined the Interim Board from taking any action to conduct an election for the school district under voting procedures enacted after November 1, 1972, unless such procedures were approved in accordance with the provisions of Section 5 (*ibid.*). In addition, the court dissolved the Permanent Board of Trustees of the Westheimer Independent School District and invalidated its official acts (*ibid.*). The court's order also required the school district to deliver to the clerk all voting materials concerning the invalidated election and all documents pertaining to the district's operations after the election (J.S. App. C-3). Finally, the court awarded the Coalition attorneys' fees and costs, to be paid by WISD (*ibid.*).

The Coalition appealed from the portion of the judgment concerning attorneys' fees,[3] and WISD cross-appealed.

ARGUMENT

There can be little doubt that the January 15, 1977, election violated the requirements of Section 5 of the Voting Rights Act. It is undisputed on this appeal that WISD is a jurisdiction subject to Section 5 which did not obtain preclearance of a change in voting practices. The Attorney General interposed an objection under Section 5 prior to the holding of this election. Immediately thereafter suit was brought to enjoin the election. In these circumstances, the district court's order setting aside the results of the election was well within its remedial powers, as established in this Court's decisions interpreting Section 5. Accordingly, this appeal raises no issue requiring plenary consideration by the Court.

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[3]See note 1, *supra*.

1. Cross-appellants do not appear seriously to contest the district court's ruling that the challenged election violates the provisions of Section 5. Their only contention that relates to the existence of the Section 5 violation (as opposed to the relief granted) is that the court "erred in refusing to consider, to any extent, the various defenses pleaded by the WISD" (J.S. 10). But the district court, in footnote 11 of its opinion (J.S. A-19), specifically addressed and rejected the sixteen defenses[4] set out in WISD's opposition to the motions for judgment.[5]

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[4]The district court properly rejected cross-appellants' defenses of collateral estoppel and res judicata on the grounds that *Ross* v. *Houston Independent School District* (see note 2, *supra*) did not involve the applicability of the Voting Rights Act to WISD and that Judge Hannay's order denying a temporary restraining order and refusing to convene a three-judge court (see page 3, *supra*) was not a final judgment and was subsequently vacated by Judge Noel. The court also correctly ruled that the other issues were either resolved by this Court in *Sheffield* (see page 4, *supra*) or by the ruling of the three-judge court in the Northern District of Texas (see page 4, *supra*), or were properly cognizable only in the United States District Court for the District of Columbia (see, *e.g.*, *Perkins* v. *Matthews*, 400 U.S. 379, 385 (1971)).

[5]WISD assigns as "[p]erhaps the most compelling" of its sixteen defenses its contention that it had not enacted or sought to administer any voting procedure different from that in effect on November 1, 1972 (J.S. 10):

> If the WISD had not been enjoined in the *Delores Ross* case in 1973, this school district could have conducted its formative election in April of that year. This was *two years* prior to the time that the Voting Rights Act became applicable to Texas. Accordingly, there was no "change in voting practice or procedures" as a result of the subject election which would trigger the provisions of the Act.

This argument simply blinks reality. That the School District could have conducted the election in question several years earlier, had it not been enjoined by a federal court from doing so, is irrelevant. In fact, the January 15, 1977, election was a special election, the first ever held for the Permanent Board of Trustees of WISD. It was conducted pursuant to election orders of the Interim Board of Trustees issued on October 14, November 11, and December 9, 1976 (J.S. App. C-2).

2. *Perkins* v. *Matthews,* 400 U.S. 379 (1971), and *Berry* v. *Doles,* 438 U.S. 190 (1978) (per curiam), make clear that in a case like this where elections have been held in violation of the preclearance requirements of Section 5 it is appropriate to set aside the election results.[6] *Perkins* recognizes that the effectiveness of Section 5, which is dependent upon voluntary compliance, would be seriously undermined if the results of violations are permitted to stand. That is especially true here, where the jurisdiction acted in complete disregard of the Attorney General's objection (J.S. App. A-5). Nor, as *Berry* makes clear, is this relief any less appropriate when suit is brought shortly before the election is held (438 U.S. at 191). Plaintiffs sued immediately after the objection was interposed. The WISD was certainly on notice that the election would be illegal. Thus this case is in clear contrast to *Allen* v. *State Board of Elections,* 393 U.S. 544, 572 (1969), which the Court described as "involv[ing] complex issues of first impression," concerning voting changes that "were not so clearly subject to § 5 that the [State's] failure to submit them for approval constituted deliberate defiance of the Act."

Cross-appellants argue (J.S. 8-9) that they did not deliberately defy the Act because Judge Hannay had refused the Coalition's request to enjoin the election and because, after preclearance was sought, they learned of the district court decision in *United States* v. *Board of Commissioners of Sheffield, Alabama,* 430 F. Supp. 786 (N.D. Ala. 1976),

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[6]If preclearance has not been sought, these cases indicate that the court should first afford local officials the opportunity to seek it.

holding that political entities that do not register voters, like WISD, are not covered by Section 5 of the Act. Judge Hannay's refusal to issue a temporary restraining order to halt the scheduled election, however, was not an adjudication on the merits that the election complied with the requirements of Section 5. Rather, that decision reflects only Judge Hannay's determination that the Coalition had failed to demonstrate the prerequisites for interlocutory relief. Moreover, the district court's decision in *Sheffield* was of doubtful validity and was not controlling authority in the Southern District of Texas. The WISD cannot be excused from compliance simply because a legal objection to Section 5 coverage was raised and upheld by a single district court. As this Court observed in reversing that decision, *United States* v. *Board of Commissioners of Sheffield, Alabama, supra,* 435 U.S. at 118, "the District Court's construction is flatly inconsistent with the Attorney General's consistent interpretations of § 5 and with the legislative history of its enactment and re-enactments."[7]

---

[7] *Williams* v. *Rhodes,* 393 U.S. 23 (1968), upon which WISD also relies (J.S. 9), is inapposite. In *Williams,* the Court had before it the question whether it should require a state, shortly before a presidential election, to place the name of a political party and its candidates on the ballot. That case simply does not involve the postponing or setting aside of an illegal election.

For these reasons, the district court properly refused to allow the results of the challenged election to stand.[8]

3. WISD also asserts (J.S. 10) that "the three-judge court exceeded its jurisdiction in commanding WISD to surrender all voting materials and district records accumulated since January 15, 1977." The United States did not request such relief in its complaint and the trial court gave no reasons for its order to surrender these materials. Cross-appellants, however, have not shown that they will suffer any harm as a result of this order, and are free to request the district court to order the release of the records if they are needed. In these circumstances, the question whether the trial court abused its discretion in ordering WISD to surrender the materials at issue is not a substantial question requiring plenary consideration by this Court.[9] See Rule 16(1)(c) of the Rules of this Court.

---

[8]Cross-appellants assert (J.S. 9-10) that, "[a]t the very least, the court should have modified its Judgment so as to require the Department of Justice and the Interim Board of WISD to meet to determine whether defects in the January 15, 1977, election could be cured, and to permit the holding of future elections which comply with the Voting Rights Act." The defects in the election can only be "cured" by conducting a new election pursuant to procedures that have been precleared as required by Section 5. Moreover, nothing in the district court's judgment precludes WISD from holding future elections that comply with the Act: the judgment enjoins the Interim Board only from conducting future elections under changed voting procedures "unless and until all of the provisions of the [Act] are complied with" (J.S. App. C-2).

[9]Contrary to WISD's assertion (J.S. 10), the order compelling the surrender of records does not conflict with the ruling of the United States Court of Appeals for the Fifth Circuit in *Ross* v. *Houston Independent School District, supra.* This order in no way alters WISD's status as a corporation established under Texas law.

CONCLUSION

The judgment of the district court, insofar as it sets aside the January 15, 1977, election of the Permanent Board of Trustees of the Westheimer Independent School District and requires surrender to the court of materials and records relating to that election, should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
DENNIS J. DIMSEY
Attorneys

JANUARY 1981

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